U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of RICHARD G. REESE and DEPARTMENT OF THE ARMY, NAVAL AIR STATION, San Diego, CA

Docket No. 98-1685; Submitted on the Record;
Issued March 7, 2000

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON, BRADLEY T. KNOTT

The issue is whether appellant's September 21, 1994 right ankle surgery was causally related to his employment injuries.

In the present case, the Office of Workers' Compensation Programs accepted appellant sustained a left ankle sprain and fracture of the left fifth metatarsal in the performance of duty on October 3, 1993. The Office also accepted that appellant sustained a fracture of the right fifth metatarsal in the performance of duty on July 6, 1994. Appellant underwent right ankle fusion surgery on September 21, 1994.

By decision dated November 27, 1996, the Office determined that the medical evidence did not establish that the September 21, 1994 right ankle fusion was causally related to the employment injuries on October 7, 1993 or July 6, 1994. In a decision dated January 29, 1998, an Office hearing representative affirmed the prior decision.

The Board has reviewed the record and finds that the evidence does not establish that appellant's September 21, 1994 surgery was causally related to his employment injuries.

Section 8103(a) of the Federal Employees' Compensation Act provides that the United States shall furnish to an employee who is injured while in the performance of duty, the services, appliances and supplies prescribed or recommended by a qualified physician, which the Office considers likely to cure, give relief, reduce the degree or the period of disability, or aid in lessening the amount of the monthly compensation.[1] The Office has the general objective of ensuring that an employee recovers from his injury to the fullest extent possible in the shortest amount of time. The Office, therefore, has broad administrative discretion in choosing means to achieve this goal. The only limitation on the Office's authority is that of reasonableness. Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of

[1] 5 U.S.C. § 8103(a).

judgment, or actions taken which are contrary to both logic and probable deductions from established facts. It is not enough to merely show that the evidence could be construed so as to produce a contrary factual conclusion.[2]

In this case, the Office found a conflict in the medical evidence between an attending physician, Dr. William Pfeiffer, an orthopedic surgeon and an Office medical adviser. In a report dated November 14, 1994, Dr. Pfeiffer noted that appellant had Charcot-Marie-Tooth, a neuropathic disorder affecting the lower extremities and had sustained injuries on October 7, 1993 and July 6, 1994. He indicated that although the October 7, 1993 injury involved primarily the left foot and ankle, his examination had noted right ankle tenderness and swelling as well. Dr. Pfeiffer stated, "because of the continued problems with the right ankle swelling, pain, deformity and now a fracture of the fifth metatarsal due to the unfavorable position of the ankle, it was recommended to the patient to undergo arthrodesis."

On the other hand, an Office medical adviser opined in a May 3, 1995 report that appellant's ankle fusion was not causally related to his federal employment. The Office medical adviser reviewed the medical history and stated that the deformity and resulting degenerative joint disease that required the fusion procedure were a reflection of the preexisting Charcot-Marie-Tooth muscular dystrophy, not the employment injuries. Section 8123(a) of the Act provides that when there is a disagreement between the physician making the examination for the United States and the physician of the employee, a third physician shall be appointed to make an examination to resolve the conflict.[3] When there are opposing medical reports of virtually equal weight and rationale, the case must be referred to an impartial specialist, pursuant to section 8123(a), to resolve the conflict in the medical evidence.[4]

To resolve the conflict, the Office referred appellant to Dr. Paul C. Milling, a Board-certified orthopedic surgeon. In a report dated January 16, 1996, Dr. Milling provided a history and results on examination. Dr. Milling stated in pertinent part:

> "The original diagnosis of left ankle sprain and left fifth metatarsal stress fracture would be caused by the work injury of October 7, 1993. The stress fracture of the right fifth metatarsal has already been accepted as a work injury of July 6, 1994, and it has healed without residual.… The right ankle fusion surgery was not related to the October 7, 1993 or the July 6, 1994 accepted injuries. The progress notes from Kaiser following the October 7, 1993 injury do not show that the patient had any objective findings of subjective complaints regarding the right ankle following either one of those injuries, in particular, the October 7, 1993 injury. The records do indicate and the patient states that he had a long history of problems with both ankles secondary to the Charcot-Marie-Tooth Disease."

[2] *Francis H. Smith*, 46 ECAB 392 (1995); *Daniel J. Perea*, 42 ECAB 214 (1990).

[3] *Robert W. Blaine*, 42 ECAB 474 (1991); 5 U.S.C. § 8123(a).

[4] *William C. Bush*, 40 ECAB 1064 (1989).

The Board finds that the impartial medical specialist provided a reasoned medical opinion that the fusion surgery was not causally related to the employment injuries. It is well established that when a case is referred to an impartial medical specialist for the purpose of resolving a conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual and medical background, must be given special weight.[5] The Board finds that the report of Dr. Milling is entitled to special weight. The attending physician, Dr. Pfeiffer, submitted a report dated August 8, 1996, in which he indicated his disagreement with Dr. Milling's conclusions. Since Dr. Pfeiffer had participated in the creation of the conflict in the medical evidence, his subsequent report reiterating his opinion on causal relationship is not sufficient to create a new conflict or outweigh the impartial medical specialist.[6] Accordingly, the Board finds that the weight of the evidence rests with Dr. Milling in this case.

The decision of the Office of Workers' Compensation Programs dated January 29, 1998 is affirmed.

Dated, Washington, D.C.
March 7, 2000

Michael J. Walsh
Chairman

David S. Gerson
Member

Bradley T. Knott
Alternate Member

[5] *Harrison Combs, Jr.*, 45 ECAB 716, 727 (1994).

[6] *See Josephine L. Bass*, 43 ECAB 929, 939 (1992); *Dorothy Sidwell*, 41 ECAB 857 (1990).